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No. 178

In the Supreme Court of the United States

OCTOBER TERM, 1951

UEBERSEE FINANZ-KORPORATION, A. G., PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 2326) is reported at 191 F. 2d 327. This opinion was supplemented by a "Memorandum on Appellant's Motion for Clarification of the Opinion of the Court" (R. 2333) which has not yet been reported. The opinion of the District Court (R. 41) is reported at 82 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals (R. 2323) was entered February 8, 1951. By order

of May 8, 1951, the time for filing a petition for a writ of certiorari was extended to July 8, 1951. The petition for a writ of certiorari was filed July 7, 1951, and was granted on October 15, 1951 (R. 2336). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether findings that enemies had substantial ownership in and complete control of petitioner are supported by the evidence.

2. Whether, by reason of such ownership and control, petitioner is an enemy ineligible to recover anything in this action.

STATUTE INVOLVED

The relevant portions of the Trading with the Enemy Act, as amended, are set forth in the Appendix to the Brief for Petitioner (pp. 35–43).

STATEMENT

This is an action, brought by petitioner under Section 9 (a) of the Trading With the Enemy Act, as amended (40 Stat. 411, 50 U. S. C. App. 1–40), for the recovery of certain properties vested by the Alien Property Custodian[1] pur-

[1] The functions of the Alien Property Custodian were transferred to the Attorney General by Executive Order 9788, October 14, 1946, 11 F. R. 11981. The action was brought against James E. Markham, as Alien Property Custodian. Tom C. Clark and J. Howard McGrath, as Attorneys General, were successively substituted as defendants

suant to that Act. Petitioner is a Swiss holding company. Through subsidiary corporations, it held various operating properties, principally in the United States. At various times in 1942, the Custodian vested the stock interests owned by petitioner in its American subsidiaries, and it is for those interests that petitioner sues.

The principal American properties held by petitioner, and the interests in them vested by the Custodian and here claimed, are as follows:

1. Harvard Brewing Company, a Delaware corporation, which through its wholly owned Massachusetts subsidiary of the same name operated a brewery in Massachusetts. 382,700 shares of Harvard (Delaware) out of a total of 625,000 shares were vested by the Custodian. Of these, 345,760 are claimed in this action.

2. Spur Distributing Company, a Delaware corporation, operating a chain of retail gasoline stations in Tennessee and 20 other states. 73,039 shares of Spur out of a total of 139,000 shares were vested and are here claimed.

3. Oil Production, Inc., and Oil Refineries, Inc., Louisiana corporations, owning oil producing and refining properties. Their assets eventually came into the hands of Amerlagene, Inc. (D. Ex. 68, R. 2241). All of Amerlagene's capital stock was vested and is here claimed.

(332 U. S. 480; R. 112). We shall use the term "Custodian" interchangeably to refer to the former Alien Property Custodian or the Attorney General as his successor.

4. Westminster Industrial Corporation, a New York corporation, engaged in commercial financing operations. Its entire stock was vested, and is here claimed.

In addition, petitioner owned the entire stock of Transdanubia Bauxite, A. G., a Hungarian corporation, operating bauxite mines in Hungary (Edg. 22, R. 55; Concl. 5, R. 62–63).

On a prior appeal, this Court held (*Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480) that a motion to dismiss the complaint, on the ground that petitioner was a foreign national, should have been denied, since on the allegations of the complaint, taken as true for purposes of the motion, petitioner was "free of all enemy taint" (332 U. S. at 482). On remand, after answer denying the allegations of the complaint relating to petitioner's asserted lack of enemy taint, and after extended trial, the district court entered judgment for respondent on the merits (R. 64). Upon appropriate findings (R. 52–62), it concluded that by reason of enemy ownership and control of petitioner and the vested properties, petitioner was barred from recovery under Sections 2 and 9 (a) of the Trading with the Enemy Act (Concl. 4, R. 62). This conclusion it found was reinforced by two subsidiary elements of enemy taint, discussed *infra*, pp. 21–26. (Concl. 5; R. 62–63.) The court said in its opinion (R. 50):

> From what has been stated, it would be difficult in my opinion to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case. The neutral aspect of ownership in the property is insignificant and it seems to me the plain intent of the Trading with the Enemy Act would be defeated by ordering a return of the vested securities.

The Court of Appeals, Judge Clark dissenting, affirmed on the ground of enemy ownership and control of petitioner, without deeming it necessary to consider the subsidiary elements of taint. It stated (R. 2327):

> This case does not involve a diluted "taint"; it involves the ownership by enemy nationals of the economic benefits of American business. This seems to be a more obvious objective of the vesting provisions of the statute than is the bare ownership of a sterile legal title.

The Facts

The facts on which these conclusions rested, as found by the district court and as disclosed by the evidence,[2] may be summarized as follows:

[2] Petitioner makes the surprising assertion (Br. p. 3, n. 1) that most of the evidence in the record can be disregarded, as relevant only to a contention, which the district court rejected, that the 1931 transaction was sham. The principal issue at the trial was whether petitioner was owned or controlled by enemies; the Government's case on this had three

It is undisputed that the entire beneficial ownership and control of petitioner rested in one or more members of the von Opel family. The significant members of that family for present purposes are Wilhelm von Opel, his wife Marta, and their son, Fritz von Opel.

Wilhelm von Opel, and his wife Marta, were at all relevant times citizens and residents of Germany (Fdg. 4, R. 52) and concededly became enemies upon the outbreak of war between the United States and Germany. Wilhelm was a leading German industrialist. From 1933 on, he was a prominent member of the Nazi party, as well as other Nazi organizations (R. 165). He received a medal and a personal telegram of congratulations from Hitler on his 70th birthday in 1941 (R. 165–166).

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major branches: (a) that the 1931 "gift" was a sham, (b) that assuming the gift instrument was an effective legal transaction, the interests and powers retained by the Opel parents in petitioner, and exercised after October 5, 1931, constituted such ownership and control as to make petitioner an enemy, and (c) that these retained interests and powers were not relinquished by the Opel parents after October 5, 1931. (See R. 42–44.) The district court decided (b) and (c) in the Government's favor. Most of the evidence received at the trial was relevant to all of those issues.

While we can understand why petitioner would prefer to brush aside most of the evidence, and most of the findings, we perceive no basis on which that could be done. On the contrary, the decision of the district court, affirmed by the court of appeals, that petitioner was an enemy because owned and controlled by enemies, necessarily rested on all the evidence as to the understandings and actions of the members of the von Opel family, and the officers of petitioner and its subsidiaries, between 1929 and the date of vesting.

This son, Fritz, was born in Germany in 1899 and resided there until December 1929, achieving some fame as a balloonist and racer (Fdg. 5, R. 52; R. 479). After December 1929, he traveled extensively in Europe and the Western Hemisphere, spending about 10% of his time in Germany (Fdg. 6, R. 52). He established a residence in Switzerland in 1934 (Fdg. 6, R. 52), but did not have sufficient continuous residence in Switzerland to be eligible for Swiss naturalization (Pl. Ex. 49, R. 1849). On November 21, 1939—almost three months after the outbreak of the war in Europe—Fritz von Opel became a naturalized citizen of Liechtenstein, under unusual circumstances which we shall discuss *infra*, pp. 23–25. He came to the United States in May 1940, as a visitor, and remained here during the war. From February 1942 to May 1945 he was interned pursuant to the Alien Enemy Act (40 Stat. 531, 50 U. S. C. 21) as a potentially dangerous alien enemy (R. 394, 597).

Acquisition of petitioner by the von Opel family.—Petitioner, and the properties owned by it, were acquired by the von Opel family with the proceeds of a 10% stock interest in the Adam Opel Works, one of the largest German motor car manufacturing firms (Fdgs. 12, 16; R. 53–54, 59). That firm had been founded by Wilhelm von Opel's father. Until 1929 it was owned by Wilhelm and his brothers. Wilhelm was the dominant figure in its management (R. 116–117.)

In 1929, General Motors Corporation purchased 80% of the stock of the Opel Works. Wilhelm retained a 10% interest, which was subject to a "put-and-call" agreement giving General Motors an option to buy and Wilhelm von Opel an option to sell at stated prices on or after April 11, 1929 (Fdg. 12, R. 53–54; Pl. Ex. 3, R. 1803).

In July 1931, Germany adopted laws which required residents of Germany to secure licenses for any transactions involving foreign exchange or foreign assets (Def. Exs. 31, 114, R. 2137–2142, 2313–2318). Wilhelm and Marta von Opel, as residents of Germany, were subject to these laws, but Fritz von Opel was not, because, although a German citizen, he had lived outside the country after 1929 (Fdg. 16, R. 54). These laws were progressively strengthened during 1931 (Fdg. 13, R. 54). Wilhelm and Fritz von Opel were very concerned about the possibility of German financial collapse and had discussed means of avoiding the danger (Fdg. 14, R. 54).

On October 2, 1931, there were issued new decrees drastically tightening the application of these foreign exchange laws (Def. Ex. 113, R. 2309). Also on or about October 2, 1931, Fritz came from Belgium to his father's house in Germany (R. 405, 406). On October 5, 1931, an instrument, hastily drawn in an hour or two (R. 239, 611), was executed, purportedly giving to Fritz the von Opel shares then held by his parents (Pl. Ex. 5, R. 1806). The attorney who drafted the in-

strument testified that its primary object was to place the shares and their proceeds outside the scope of the German foreign exchange legislation (R. 227). As he further testified, the saying was then current in Germany that "money alone shouldn't make you happy; you should have it in Switzerland to be happy about it" (R. 228).

The instrument of October 5, 1931, provided, among other things (R. 1806):

> The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20 percent of all dividends and interest received will accrue to Fritz von Opel.

The instrument further provided that if Fritz predeceased his parents without leaving legitimate issue, the gift was void and was to revert to the parents. If the parents died before Fritz, the gift was to be considered an advancement to be deducted from his share in his parents' estate. Usufruct income not drawn by the parents was also to be accounted for by Fritz as an advancement.

In the light of the foregoing evidence, the district court found (Fdg. 18, R. 54–55) that the primary object of the 1931 transaction was to obtain payment upon sale of the Opel shares in the form of gold or American currency instead of German marks, while a second purpose was to

make financial provision for Fritz von Opel.[5] The court further found (*ibid.*) that the 1931 gift was not intended to be a sham transaction, but was intended to be a gift of part interest of the owners, and that legal title to the 600 Opel shares passed to Fritz von Opel by the agreement.[6]

To effectuate the primary object of the agreement, Fritz sailed on October 7, 1931, for New York and on October 17, pursuant to the "put and call" agreement, sold the shares to General Motors (R. 650–651; Pl. Ex. 6, R. 1807) for approximately $3,500,000, some two-thirds of which was paid in cash and the balance in General Motors stock (Pl. Exs. 65, 68, R. 1861, 1863). Between 1931 and 1934, these funds were invested in properties which substantially correspond with those vested by the Custodian. Early in 1932, Fritz, with his father's specific approval, purchased all of the shares of petitioner and had the

[5] This purpose was accomplished by the contractual stipulation that Fritz was to receive 20 percent of the income from the property. In fact, the record indicates that once petitioner was established Fritz received money by way of salary or expenses from petitioner rather than by way of dividends (see Pl. Ex. 75, R. 1873–1874).

[6] The remaining 10 percent interest in the Opel works had been retained by Wilhelm's brother Fritz Opel (the uncle of the Fritz von Opel here involved). These shares were purportedly sold by the senior Fritz to his nephew Hans, a resident of Switzerland, in October 1931, a transaction which was later reversed as in violation of German foreign exchange laws (R. 1590–92).

American investments and funds transferred to it (Def. Ex. 8, R. 2001, 2008–2010).

The usufruct in favor of Wilhelm and Marta von Opel.—The gift agreement of October 5, 1931, provided, as stated, that the usufruct in the entire property remained with Wilhelm and Marta von Opel and that Fritz was to receive 20 percent of the dividends and interest. Wilhelm von Opel insisted on these provisions and would not have signed the agreement without them (R. 160, Def. Ex. 8, R. 2000–2001).

A usufruct in German law is an interest *in rem* which includes as a minimum the right to the income from the *res* (here subject to Fritz' contractual right to 20 percent of the income), a right to co-possession of the property, a voice in its management and, in the view of some German authorities, certain voting rights where the property, as here, consists of shares of stock (Fdg. 52, R. 60–61).[5] These rights retained by Wilhelm and Marta von Opel attached to any proceeds of the property (Pl. Ex. 5, R. 1807; Fdg. 36, R. 57). The district court found that such a usufruct was established in the shares of petitioner (Fdgs. 35–

[5] In view of the intent and agreement of the parties, as disclosed by their conduct, that Wilhelm and Marta von Opel retain complete control of the property and in view of the evidence that such control was in fact exercised, the trial court found it unnecessary to attempt to resolve the conflicting theories of German law with respect to voting rights. See *infra*, pp. 14–21.

38, 42, R. 57–59) and that the usufruct continued in existence to the date of vesting (Fdg. 53, R. 61).*

Other understandings between Fritz von Opel and his parents.—The written instrument, however, did not fully reflect the understandings reached between Fritz and his parents (R. 240, 241; Def. Ex. 8, R. 2001, 2073). Thus, although the instrument recited (R. 1806) that it was the desire of the Opel parents that the 600 Opel shares "remain with the male line of our family in order to preserve a personal connection between the bearers of the name of Opel and the work of our father Adam Opel," it had been agreed by all parties that Fritz von Opel should promptly leave for New York to convert the shares into gold or dollars (R. 229, 234, 613–617, 2001; *cf.* Fdg. 18, R. 54–55). In selling the shares, moreover, Fritz acted, not as donee, but as attorney in fact for Wilhelm von Opel under a power of attorney given him after the date of the gift (Pl. Exs. 4, 6, R. 1804, 1807). At no time did he

* Petitioner seems to attack these findings (Br., p. 27, n. 13). They were affirmed by the Court of Appeals (R. 2327). Petitioner suggests no reason—and we can conceive of none—for departure from the ordinary rule that this Court will not review findings of fact which have been concurred in by two courts below. *Allen* v. *Trust Co. of Georgia*, 326 U. S. 630, 636; *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214; *Anderson* v. *Abbott*, 321 U. S. 349, 356. That rule is particularly applicable where, as here, the evidence consisted largely of testimony and raised issues of credibility. In any event, the findings were abundantly supported by evidence.

inform any official of General Motors that he was the donee of these shares (R. 651).[7]

Another oral understanding was that Fritz would transfer the proceeds of the sale to a holding company to protect the interests created (Def. Ex. 8, R. 1987, 2001, 2008). In fact, petitioner was acquired by the von Opels within a few months of the October 1931 agreement (Def. Ex. 8, R. 2006, 2008). Fritz von Opel swore, in an affidavit filed in 1935, that upon the execution of the 1931 deed "my father received an oral stipulation from me which was not included in the document, to the effect that these shares or their proceeds would be transferred by me immediately to a corporation whose shares would be distributed or held so as to safeguard the various interests in the stock or its proceeds set forth in the deed of gift" (Def. Ex. 8, R. 2001). Fritz further stated that he discussed with his father the proposed purchase of petitioner, and that his father agreed that petitioner "might serve as the holding company originally contemplated between us" (R. 2008; see Fdg. 20, R. 55). One reason for the selection of petitioner as that

[7] Indeed, while Fritz was in New York, Wilhelm von Opel was negotiating a modification of the option agreement with General Motors' European representative (Def. Exs. 6, 7, R. 1967, 1968). At first he authorized Fritz to conclude an agreement on the basis of his modification (Def. Ex. 6, R. 1967) but later ratified the sale on the terms on which Fritz and the officers of General Motors had agreed (Def. Ex. 58, R. 2229).

vehicle was that Hans Frankenberg, a Swiss businessman in whom Wilhelm von Opel had confidence, had already agreed to act as director of petitioner (R. 954–955). Upon the purchase of petitioner by the von Opels, Frankenberg was, at Wilhelm's request, made its managing director (Fdg. 39, R. 58).[8]

Control by the Opel parents of petitioner and its American investments.—A further understanding of the parties was that Wilhelm von Opel was to exercise complete control over petitioner's management. The district court found that Hans Frankenberg, as managing director of petitioner, acted at all relevant times as agent for Wilhelm von Opel (Fdg. 41, R. 59); that as such agent Frankenberg, from the spring of 1932 to the date of vesting, exercised control over the investments and activities of petitioner (Fdgs. 40, 43, R. 58–59); and that Fritz von Opel's activities in connection with petitioner were to a large degree carried on with the guidance and under the direction of Wilhelm von Opel, or his agent, Hans Frankenberg (Fdg. 45, R. 59).

Petitioner sharply attacked these findings in the district court (R. 1711 *et seq.*). The trial judge refused to modify them, stating that the

[8] The choice of a Swiss corporation may also have been influenced by the fact, which Frankenberg candidly admitted in justifying a fictitious sale of petitioner's shares in 1936, that "after all, Switzerland was the place where capital from all over the world used to come to, just for the purpose of hiding" (R. 842).

evidence as to Frankenberg's agency was "just overwhelming, in my judgment" (R. 1729) and characterizing Frankenberg as "the guiding genius" in petitioner's affairs (R. 1725).

The record amply demonstrates the control exercised over the proceeds of the 600 Opel shares, and over petitioner and its American investments, by Wilhelm von Opel, acting in person or through Frankenberg as agent. A few illustrations of the scope of that control will suffice. We have already noted Wilhelm's participation in the sale of the Opel shares to General Motors. (P. 13, n. 7, *supra*.) The proceeds of that sale were placed in custodian accounts in New York (Pl. Ex. 66, R. 1862); in conformity with the usufruct agreement, the cash and securities were placed in a principal account and the income accrued was divided monthly, 80 percent of income to the principal account, and 20 percent to a separate account for Fritz; Wilhelm was authorized to draw on these accounts (Pl. Ex. 70, R. 1865, 1869–1870). As indicated, Wilhelm agreed to the purchase of petitioner, and caused Frankenberg to be made petitioner's managing director (Def. Ex. 8, R. 2008). Thereafter, Fritz, in acting for petitioner, did so under powers of attorney signed by Frankenberg (Def. Ex. 8, R. 1985, 2009–2010). He was neither an officer nor a director of petitioner. As petitioner's president testified, "the general conduct of business—that is, the manage-

ment of its affairs—was never entrusted to Mr. Fritz von Opel" (R. 1510).

Fritz stated that he frequently consulted with Frankenberg about investments, and that at the end of 1932 he discussed with Frankenberg the investments which had been made or contemplated and Frankenberg "approved of them" (Def. Ex. 8, R. 2011, 2014). In 1933, he was "told" by Frankenberg to convert petitioner's cash into gold; he thereupon purchased $1,250,000 in gold pieces which became the subject of litigation in 1935 (Def. Ex. 8, R. 2014) (see *infra*, pp. 18–20). In 1936 Frankenberg, in New York, directed a fictitious sale (R. 2327) of the stock of petitioner to a group of Swiss "purchasers" in order to avoid holding company taxes in the United States, a transaction which was later reversed (R. 838, 841, 937, 938, 946; Def. Exs. 67, 87, R. 2236, 2278).

During the period 1931–37, many of the detailed transactions in the United States were conducted by one Hoffacker, in whom Fritz von Opel had confidence (Def. Ex. 8, R. 2011, 2019–2036). Among other things, Hoffacker, in 1934, shortly after Wilhelm von Opel was fined 3,500,000 reichsmarks by a German court in connection with the 1931 gift agreement (R. 448), told the American vice president of the Louisiana oil corporations that Wilhelm had "become involved with the Nazis * * * and needed funds," and asked if the Louisiana companies could contribute (R. 1229). An oil lease was accordingly sold for

approximately $150,000, which was transmitted to petitioner (R. 1230).

Hoffacker became a principal officer of most of the American subsidiaries of petitioner.[9] In 1937 Wilhelm von Opel expressed to Fritz strong disapproval of Hoffacker (R. 1236). Not long thereafter Frankenberg caused Hoffacker to be removed from all connection with these companies, and to be replaced by one Ulrich, an old friend of Frankenberg's (R. 1243–1244, 1246, 1197).

In addition to thus discharging a principal officer of the American companies, Wilhelm von Opel, in person and through Frankenberg, exercised the power of final decision over their affairs. For example, in 1937 the American officers of the Louisiana oil companies were summoned to Switzerland to discuss plans for future operation with Fritz and Frankenberg (R. 1239). During these conferences, Frankenberg told one of the Louisiana officials that he had been representing and assisting Wilhelm von Opel for many years, and at the close of these conferences, Fritz expressed to the same official his pleasure that Frankenberg had approved the plans (R.

[9] He held the following positions:

Director and Vice President of Harvard Brewing Co. (Delaware) and President and Chairman of the Board of its Massachusetts subsidiary (Def. Ex. 8, R. 2022, 2027–2028).

Director and Vice President of Spur Distributing Company (Def. Ex. 8, R. 2022, 2024).

Director and President of Oil Production, Inc., and Oil Refineries, Inc. (Def. Ex. 8, R. 2022, 2091).

1242). Later in 1937 the American officers of Spur Distributing Company discussed with Fritz a proposal to set up a system of subsidiary distributing companies (R. 1137). Fritz said that Frankenberg, as his father's agent, would have to "pass on anything of this magnitude"; Frankenberg rejected the proposal and Fritz explained that he regretted the decision but there was nothing he could do about it (R. 1137–1139). In 1938, Frankenberg directed a sale of some of the Louisiana oil properties (R. 1245). In September 1939, Fritz sent a telegram to the American president of Spur stating that "overseas investors" [10] intended to sell the Spur shares (R. 1143; Def. Ex. 105, R. 2301). Fritz later told this official by telephone that he personally regarded the stock highly and regretted the decision to sell it but that his father had ordered Frankenberg to sell it (R. 1144). Apparently, Wilhelm changed his mind, for the stock was not sold. Indeed, in January 1941, the president of Spur suggested that, in view of the possibility of war with Germany, it would be desirable to sell the stock; Fritz, however, then said that his father would not be receptive to the idea (R. 1147, 1148).

Recognition by petitioner and the parties to the 1931 arrangement of its practical effect.—Petitioner and the parties to the 1931 arrangement

[10] Overseas is the English translation of Uebersee and petitioner has sometimes been referred to as Overseas Finance Corporation.

repeatedly disclosed their general understanding concerning the importance of the ownership and control retained by Wilhelm von Opel under the 1931 arrangement.

Thus, the position taken by petitioner in litigation in 1935 and an affidavit filed by Fritz von Opel in support of that position express an unequivocal recognition that petitioner and its assets were the property of Wilhelm von Opel. In that year, petitioner brought an action against the Federal Reserve Bank of New York and others seeking possession of $1,250,000 in United States gold pieces which had been purchased by petitioner in 1933 and were thereafter ordered seized by the Secretary of the Treasury under the Gold Reserve Acts. *Uebersee Finanz-Korporation* v. *Rosen* (S. D. N. Y., 1935), affirmed, 83 F. 2d 225 (C. A. 2), certiorari denied, 298 U. S. 679 (hereinafter referred to as the "Gold case").[11] In an effort to release the gold, petitioner asserted that the real and beneficial owners of it were Wilhelm and Marta von Opel who, as nonresidents of the United States, were not, so petitioner contended, subject to the Gold Reserve Acts. This assertion was supported, *inter alia*, by an affidavit of Fritz von Opel stating that under the 1931 deed "naked title only to the shares was transferred to me" (Def. Ex. 8, R.

[11] The pertiment portions of the record on appeal in that case are set out herein as Defendant's Exhibit 8 (R. 1968-2104).

2000) and that the reservation of a usufruct "left with me a mere legal title plus 20 per cent of the dividends and interest" (R. 2001). He further stated that the shares of petitioner were in Switzerland in a safe deposit box, the key to which was "held by Dr. Frankenberg as agent and representative of my father, Wilhelm von Opel, for the purpose of safeguarding his usufruct" (R. 2017). And in a memorandum filed with the court, petitioner stated that the establishment of the usufruct "means, of course, that the entire beneficial enjoyment * * * would inhere in Wilhelm and Marta von Opel * * * while * * * only a naked legal title analogous to trust or custody would remain in Fritz von Opel" (R. 2084; see also R. 2081–2084).

Nor were such statements made solely for the purposes of litigation. Thus it was testified that, in 1934, speaking of the fine of 3,500,000 reichsmarks imposed upon him by a German court in connection with the 1931 gift agreement, Wilhelm stated that "it was well worth three and a half million marks to have his assets outside of the German locked safe" (R. 569). In 1937, Fritz similarly stated to an American officer of one of petitioner's subsidiaries that he was operating under a usufruct contract with his father and that he had to account to his father for the funds subject to that contract (R. 1236). Again, the president of Spur Distributing Company testified that, while he was in England in August 1939, Fritz by

telephone invited him to come to Germany to meet Wilhelm von Opel, saying "After all, you work for my father and it is rather important that you know him" (R. 1143).[12]

Petitioner's doing of business in Hungary.—Although resting its decision primarily on enemy ownership and control of petitioner, the district court referred to other circumstances as "further evidence of enemy taint" (R. 63). One of these concerned petitioner's Hungarian subsidiary. Petitioner, as we have mentioned, owned all of the stock of Transdanubia Bauxite A. G., a Hungarian corporation mining bauxite in Hungary (Fdg. 22, R. 55; Concl. 5, R. 62–63). It had acquired this property in 1935 for 78,750 Swiss francs and had advanced to the corporation between 1935 and 1942 approximately 110,000 Swiss francs (R. 727–729; Def. Ex. 70, R. 2251). A state of war between the United States and Hungary was declared on December 13, 1941

[12] Some of these statements and some of the testimony set forth in the preceding pages were denied by witnesses for petitioner. These denials raised square-cut issues of credibility which the trial judge unequivocally resolved. He stated that he "frankly believe[d]" the testimony of Mason Houghland (the president of Spur Distributing Company) and his son, denied by Fritz von Opel, as to discussions that they had had with Fritz (R. 1679; see also R. 1734). On the other hand, he found that "there was some evasiveness" about Frankenberg's testimony (R. 1729) and in connection with testimony of petitioner's president, Meier, he made the cogent observation that "there were a great many vague statements from some of these witnesses" (R. 1716–1717).

(Fdg. 31, R. 56). Petitioner held the shares of Transdanubia and carried the investment in that company on its books throughout the war (Fdg. 28, R. 56; Def. Ex. 70, R. 2251–2255). It never took any steps to sever its relationship (Fdg. 30, R. 56). To the contrary, in 1940 when Transdanubia borrowed 32,000 Swiss francs from a Hungarian bank, petitioner had caused a Swiss bank to guarantee the loan and deposited 32,000 francs as collateral (Fdgs. 23–25, R. 55–56), and at quarterly periods through September 1942, this loan was extended upon petitioner's request until Transdanubia repaid the loan in November 1942 (Fdgs. 26, 27, R. 56).

Fritz von Opel, on behalf of petitioner, made several trips to Hungary in 1939 to expedite the production of bauxite (R. 893, 894; Def. Exs. 76, 93, 95, R. 2262, 2286, 2288) and was active in Transdanubia's affairs and its business relationship with Giulini Bros., a German aluminum manufacturer which purchased its bauxite (Def. Exs. 76–82, 92–94, 96, 97, R. 2262–2271, 2285–2287, 2294, 2296). Thus, when on September 16, 1939, after the outbreak of war in Europe, Giulini Bros. wrote Fritz that (Def. Ex. 81, R. 2270)

> you would do meritorious service for the raw-material supply of the German aluminum industry and the entire war economy of Germany if you would tackle with all your energy the resumption of production in the mines.

Fritz promptly telegraphed that "upon receipt of order" he was "immediately ready to travel Budapest for purpose of starting production" (Def. Ex. 82, R. 2271). Fritz, in fact, did go to Budapest in November 1939 (R. 893, 894, 1641; Def. Ex. 93, R. 2286) and shortly thereafter Transdanubia entered into a contract whereby it undertook to deliver 100,000 tons of bauxite to Giulini Bros. in 1940, 1941 and 1942 (Def. Ex. 97, R. 2296). This contract resulted from negotiations carried on by Fritz in Hungary (*ibid.*). Shipments were made pursuant to this contract at least as late as October, November and December, 1941 (Def. Ex. 90, R. 2282, 2283). There is no suggestion in the record that such shipments did not continue at least through 1942 as called for by the contract.

Fritz von Opel's asserted neutrality.—The other subsidiary element of enemy taint considered by the district court concerned Fritz von Opel. The district court found that his activities in connection with the affairs of petitioner were carried on to a large degree "with the guidance and direction of Wilhelm von Opel, or his agent, Hans Frankenberg" (Fdg. 45, R. 59). In addition, it pointed out that despite Fritz' acquisition of neutral citizenship his "roots remained firmly planted" in Germany (Opinion, R. 49).

As indicated above (p. 7), Fritz von Opel was a German citizen until after the outbreak of World War II in Europe. On November 21, 1939, he became a naturalized citizen of Liechten-

stein under unusual circumstances. He at no time resided in Liechtenstein and had never been physically present in that country except while traveling through it (Fdg. 7, R. 52–53). Although Liechtenstein's citizenship law has a three year residence requirement, this may be waived "under extraordinary circumstances that ask for special consideration" (*ibid.*; Pl. Ex. 177, R. 1951). The law also requires the taking of an oath of allegiance, but Fritz at no time did so (Fdg. 9, R. 53). He claimed that his failure to do so was because he was too sick to travel to Liechtenstein (*ibid.*; R. 492). Yet on November 10, 1939, Fritz passed through Liechtenstein on his way to Hungary (R. 893, 492) and on the date of his naturalization he was in Hungary attending to bauxite matters (*supra*, p. 23) (R. 894, 1641; Def. Ex. 93, R. 2286). Fritz paid approximately $10,000 for his naturalization, two-thirds to the community and one-third to the principality (Fdg. 8, R. 53), a sum equivalent to 3 percent of the national budget of that country in 1939 (R. 494–495). While the Liechtenstein naturalization laws require some payment for naturalization, there was no evidence that payments of this magnitude were normal. Fritz explained his acquisition of Liechtensteinean citizenship by saying that he had bought a Liechtensteinean passport for the equivalent of $10,000, and that when captured by the British at Gibraltar in 1940 he had "succeeded in fooling

them" with that passport (R. 1146).[13] In the light of such testimony, the district court, in its opinion, properly characterized Fritz' Liechtenstein citizenship as a "technical status" (R. 48), a matter of "technical form" only (R. 49).

The district court further found that Fritz' statements and acts between November 1939 and Pearl Harbor indicated "a continued interest in the welfare of and sympathy for Germany" (Fdg. 10, R. 53). This finding is abundantly supported. Mention has already been made of his ready response to an invitation to do "meritorious service for * * * the entire war economy of Germany" by speeding up bauxite production in Hungary (*supra*, pp. 22–23). He frequently spoke of "We Germans", and expressed his hopes for an early German victory.[14]

A statement made in January 1941 is particularly revealing not only of Fritz' personal attitudes but also of Wilhelm's dominant position

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[13] He also wrote the president of Harvard Brewing Co. that he had felt "obliged" to acquire another citizenship for business reasons (Def. Ex. 95, R. 2294; see also R. 1609–1610).

[14] Illustrative statements are:

"There isn't going to be much of a war." The English won't fight. All we are going to do is take off a little slice of Poland" (August, 1939). (R. 1142).

"By using rockets and secret weapons, we will finish up this war in no time at all" (early summer, 1940) (R. 1105).

He expressed pleasure in the German progress in France and the low countries and in the fact that "some of his inventions were playing a particular part in it" (early summer, 1940) (R. 1105–1106).

See also statement quoted in the text, p. 26, *infra*.

in the enterprise. At this time, Houghland, the President of Spur Distributing Company, met Fritz in Savannah, Georgia, and pointed out the undesirability of German stock ownership in Spur. He urged that the shares held by petitioner be sold, observing that if the stock was not sold it might in the event of war between the United States and Germany be seized by the Government as had been done with German property in World War I (R. 1147, 1148). Fritz' reply was "We Germans and my father and I have all thought this out" (R. 1148). He explained that if war came, the Spur stock would be in the hands of Swiss nationals and that if Switzerland became involved in the war, it would be in a holding company in a neutral Latin American country (R. 1148).[15]

SUMMARY OF ARGUMENT

I

On the prior appeal herein, *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, this Court

[15] In fact, it was at about this time that some 36,000 shares of Harvard Brewing Company, purportedly the property of Fritz von Opel's wife and not here in suit, were held for the account of Sociedade Commercial Montefranco, a Brazilian corporation (R. 813–816). Montefranco is a literal translation of the German name Frankenberg (R. 815). Petitioner also in 1939 had dealings in Argentina which involved the establishment of credits in the peso equivalent of $522,548 (R. 926–927; Def. Ex. 108, R. 2303).

Compare also the sham sale initiated by Frankenberg in 1936 in an unsuccessful effort to avoid taxes (*supra*, p. 16).

established the rule that a neutral corporation, owned or controlled by enemies, is itself an enemy, ineligible to recover property vested under the Trading With the Enemy Act. Petitioner concedes the correctness of this rule. It argues that there was no such ownership or control here; that the entire ownership of its shares, and legal and actual control of its affairs, rested in Fritz von Opel, an asserted neutral. Fritz is claimed to have acquired these interests by gift from his father in 1931. This contention is directly contrary to explicit findings by the courts below, which are supported by abundant evidence. The district court found that the primary purpose of the 1931 transaction was to place certain assets then owned by Wilhelm von Opel outside the scope of the German foreign exchange controls. It further found that Wilhelm, while transferring legal title to the assets, had reserved a substantial ownership interest in them, including a right to possession and the right to the income; that Wilhelm exercised complete control of petitioner; and that to the extent that Fritz von Opel acted in petitioner's affairs, he did so subject to the guidance and direction of his father.

II

Such ownership and control satisfy the rule laid down by this Court on the prior appeal. The test of enemy ownership or control is con-

cerned with economic fact, not legal form. It disregards formal title and looks at beneficial ownership. It considers control exercised *de facto*, whether or not resting in legal basis, and is satisfied by potential control without requiring a showing of its actual exercise. If, as here, enemies have the power to "make and unmake [the corporate] officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account", *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.*, [1916] 2 A. C. 307, 340; the corporation is an enemy. Here enemies not only exercised control but owned the primary beneficial interest.

Petitioner's further suggestion that there must be proof of actual utilization of the properties for economic warfare is in effect an argument that the barn door can be locked only after the horse is stolen. Seizure of enemy property has never operated on any such stultifying principle; it is designed to deprive enemies of the opportunity of benefiting from assets of any kind in this country, *Propper* v. *Clark*, 337 U. S. 472, 481, and it reaches any property "which the adherents of the enemy have the power of devoting to the enemy's use." *Miller* v. *United States*, 11 Wall. 268, 306. Here, Wilhelm von Opel, an enemy, had substantially all the power over petitioner's American assets which he would have had, had he owned them directly.

III

While the ownership and control of petitioner by an enemy is sufficient, we believe, to defeat the present action, there are two additional circumstances, referred to by the District Court although not considered by the Court of Appeals, which confirm this result. In the first place, the only asserted non-enemy interest in petitioner is in Fritz von Opel. Fritz is a native of Germany, whose citizenship of Liechtenstein, hastily acquired in November, 1939, was properly deemed by the district court a matter of technical form only. In all his activities relating to petitioner, Fritz acted under the control of his father and as his father's agent. Accordingly, it is artificial in the extreme to describe any interest that Fritz may have owned as an independent neutral interest. In the second place, petitioner, through a wholly-owned subsidiary, did business in Hungary, an enemy country. Under Section 2 of the Trading With the Enemy Act a foreign corporation which does business in enemy territory is an enemy. In the light of this Court's decision on the prior appeal, we believe that the doing of such business through a subsidiary in whose affairs petitioner actively participated was properly regarded by the district court as constituting an additional element of enemy taint.

IV

Petitioner's claim for a partial recovery is in effect a claim for complete recovery. It seeks return to it of the entire vested assets, and suggests that the Custodian should instead vest, and enforce in Switzerland, interests created by an agreement concluded in Germany in shares of a Swiss corporation located in Switzerland. The suggestion is plainly illusory. Any claim which petitioner might make to a true partial recovery is precluded here, having been rejected by the trial judge in a proper exercise of his discretion as not having been seasonably advanced and as requiring in effect that the trial be reopened for additional evidence and arguments. In any event, as petitioner itself concedes, a claim to partial recovery must fail where, as here, the plaintiff is shown to have been controlled by an enemy.

ARGUMENT

The principal questions in this case are questions of fact. Petitioner apparently concedes, as it must under this Court's decision in *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, that under the Trading With the Enemy Act, as amended during World War II, a corporation actually controlled by enemies is itself an enemy and is barred from recovering vested assets (Br. pp. 11, 14, 19, 20, 21, 24). It similarly concedes that where a corporation is thus controlled by the enemy "the entire corporate assets in

the United States might be seized and the corporation itself could not recover them" (Br. p. 26). In such a case it agrees that any asserted neutral interest in the corporation can be recovered, if at all, only in a separate suit by the neutral stockholder and that the present suit is concerned exclusively with the right of the corporation to recover (*ibid.*; see also Br. p. 10).

Thus, petitioner concedes that all of its contentions in this case must fail if it is found to have been owned and controlled by enemies. Its argument is devoted primarily to the assertion that it was not so owned and controlled. That assertion is directly in conflict with explicit findings of fact by the district court, and with overwhelming evidence. In the first point of this brief, therefore, we shall discuss the findings and the supporting evidence which establish that petitioner was owned and controlled by enemies. In succeeding sections of this brief we shall demonstrate that petitioner's concession was required, and that by reason of enemy ownership and control, as well as other circumstances, petitioner is an enemy and may not recover any part of the property here sued for.

I.

PETITIONER WAS OWNED AND CONTROLLED BY ENEMIES

Petitioner asserts that "no enemy control or ownership of petitioner's shares was present" (Br. p. 11; see also p. 24). It asserts that the findings of the district court establish that Fritz

von Opel had "beneficial ownership" of petitioner's shares, "subject only to an option, never exercised" on the part of his parents to demand 80% of the dividends, and that "both legal control and actual control of the corporation" were in Fritz von Opel (Br. pp. 7–8).

In fact, the district court found the exact opposite. It concluded that petitioner "is indirectly owned and controlled by enemies" (Concl. 2, R. 62). The scope and extent of that ownership and control is shown by the findings and evidence which we have summarized in the Statement, *supra*, pp. 7–21. Because petitioner's entire argument depends, however, on the correctness of its view of the facts we shall, at the risk of repetition, restate the actual scope of the interests held by enemies in petitioner.

In the first place, the Opel parents had the rights expressed by the German law concept of a usufruct. Those rights were found by the District Court (Fdg. 52, R. 60–61) to be rights, *in rem*, in all the shares of petitioner, and to include (i) the right to the income from the property (here subject to a contractual obligation to pay 20% of that income to Fritz von Opel (R. 2334)), (ii) the right to co-possession of the shares (in fact the evidence is clear that Wilhelm von Opel's agent had the exclusive possession),[16] (iii) the

[16] He had the only key to the safe deposit box in which petitioner's shares were kept (R. 623; Def. Ex. 8, R. 2017; see Fdgs. 37, 38, 42, R. 57, 58, 59).

right to prevent sale or disposition of the shares, and (iv) certain rights of management of the shares and the corporation issuing them. These rights are clearly substantial property interests (R. 2327).

But these rights are only the minimum statement of what the Opel parents possessed. As we have pointed out (*supra*, pp. 12–31), the instrument of October 5, 1931, did not reflect the entire understanding between the parties. In particular, it was clearly understood that Wilhelm von Opel was to retain the entire control of the 600 Opel shares which were the subject of that instrument, and of their proceeds. For this reason, those proceeds were transferred to a holding company, petitioner, "to safeguard the various interests in the stock or its proceeds" (see p. 13, *supra*), and Frankenberg, Wilhelm's trusted agent, was at Wilhelm's request made managing director of petitioner. From that time until the date of vesting, as the district court found (Flgs. 40, 41, 43, 45, R. 58–59), Wilhelm von Opel, acting largely through Frankenberg as his agent, exercised control over petitioner and directed the activities of Fritz von Opel in so far as they related to petitioner.[11]

Petitioner's view of the facts is in flat contradiction to these express findings. In addition,

[11] In the light of the foregoing, petitioner's unsupported assertion (Br. P. 24) that it "was acquired for the purpose of precluding the enemy from obtaining or utilizing its assets" must be dismissed as pure fantasy.

it is wholly inconsistent with the dominant purpose of the 1931 transaction as found by the Court. Petitioner's argument assumes, in effect, that in October 1931, Wilhelm and Marta von Opel made an outright gift to their son of property worth approximately $3,500,000. None of the circumstances surrounding the transaction suggest that that was its purpose. The transaction was initiated and carried out in great haste at a time when Wilhelm feared financial collapse in Germany and when German foreign exchange controls were being drastically tightened (Fdgs. 13, 14, R. 54). Its "primary object," as the district court found, was "to obtain payment upon sale of the Opel shares in the form of gold or American currency, instead of German reichmarks" (Fdg. 18, R. 55).[18]

In short, as the courts below in effect found, the 1931 transaction, although not a sham, was a transaction of only limited significance with respect to the economic rights of the parties to

[18] That this was its purpose is shown not only by the express statements of the attorney who drafted the instrument (*supra*, pp. 8–9) but also by the way in which it was prepared and carried out. On or shortly before October 2, 1931, Fritz von Opel, then in Belgium, came to his father's house in Germany (R. 405, 408). On October 2, 1931 (the day on which amendments were adopted tightening the German foreign exchange laws (Def. Ex. 113, R. 2309)), Fritz consulted Hachenburg, Wilhelm's regular lawyer and a man of preeminent reputation (R. 323, 410, 590). Thereupon

it. It was effective to give Fritz von Opel legal title to the 600 Opel shares and their proceeds (Fdg. 18, R. 54–55). We may assume that it gave Fritz a valid contractual claim against his parents for 20% of the interest and dividends (see R. 2334). We may also assume that on the death of Wilhelm and Marta the entire property in the shares would pass to Fritz or his legitimate issue, provided they survived the Opel parents. In this aspect, the instrument made a transfer to take effect on death which did not affect the substantial beneficial ownership and complete control held by Wilhelm and Marta von Opel at the outbreak of the war and on the date of vesting. In

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Hachenburg drafted various preliminary papers, but in a letter dated October 5, 1931, stated that several aspects of the matter, especially the tax aspects, required further study (Pl. Exs. 7–10, R. 1809–1820).

Without further ado, however, Wilhelm on October 5, took the matter to another attorney who had not generally acted as counsel for any of the von Opels (R. 213, 592) and who, as he testified, in "about as much time * * * as you have for catching a lunch" (R. 239) prepared the instrument which the court found was signed the same day. Two days later, on October 7, Fritz sailed for New York to sell the 600 Opel shares for dollars and General Motors shares (R. 650–651, Pl. Ex. 6, R. 1807). This extraordinary haste in a transaction of this magnitude, this unwillingness to wait for the resolution of complex tax and other problems, is explainable only on the view that the transaction was not intended to have any important effect on the economic rights of the parties but merely to serve as a convenient device by which Wilhelm could avoid the impact of the German foreign exchange regulations.

view of that ownership and control the Court of Appeals was fully warranted in saying (R. 2337):

> This case does not involve a diluted "taint"; it involves the ownership by enemy nationals of the economic benefits of American business.

Petitioner's view of the facts is also completely inconsistent with the assertions made by petitioner itself in litigation against agencies of the United States in 1935. In an affidavit filed on petitioner's behalf in the "Gold case" (see *supra*, pp. 19–20) Fritz von Opel stated that the usufruct reserved by the 1931 instrument "left me with a mere legal title plus 20% of the dividends and interest" (R. 2001). And a memorandum submitted by petitioner similarly stated that the establishment of the usufruct "means, of course, that the entire beneficial enjoyment * * * would inhere in Wilhelm and Marta von Opel * * * while only a naked legal title analogous to trust or custody would remain in Fritz von Opel" (R. 2084).[19] Even if we assume that petitioner can now be heard to assert the falsity of its own representations to the courts of the United States, the courts below were clearly warranted in accepting the version of the facts insisted on by petitioner in 1936. Indeed, that version is reflected in every statement made by

[19] A footnote added: "The 20% of dividends and interest * * * is a grant out of the reserved estate, proceeds from the usufructuary, and does not give Fritz von Opel any part of the beneficial use and enjoyment" (R. 2084).

Fritz and Wilhelm von Opel prior to the present suit.

A word further may be appropriate on petitioner's suggestion that the interests and powers retained by Wilhelm and Marta von Opel were contingent or unexercised. *E. g.*, Br. pp. 7–8, 23. We do not believe it is necessary that they be exercised; the Trading With the Enemy Act looks to potentialities as well as to rights actually exercised (see pp. 48–50, 52–53, *infra*). In any event, they were exercised.

Thus, the district court found that Frankenberg, as Wilhelm von Opel's agent, "exercised control" over petitioner's affairs to the date of vesting (Fdgs. 40, 43, R. 58–59) and that Fritz' activities "were carried on" with the guidance and direction of Wilhelm and Frankenberg (Fdg. 45, R. 59).[20] We have summarized above the

[20] Petitioner states that "the stock was voted by or for the neutral holder of legal title, Fritz von Opel" (Br. 6). This is surprising in the face of testimony by petitioner's witness Frankenberg, its managing director, that he had to have the key to the safe deposit box in which the shares were kept "to get the stock out from time to time *to vote it*" (R. 857). [Emphasis supplied.] In view of Frankenberg's status as agent of Wilhelm von Opel, the implications of this statement are obvious. Petitioner's record references are merely to an equivocal and unresponsive statement by Meier, petitioner's president, and to minutes of stockholders' meetings in 1932 and 1935 at which Fritz was recorded as not present and the entire shares were recorded as voted by Frankenberg (1932) or by various of the corporate officers including Frankenberg (1935). To the same effect see R. 2052 (1933 meeting), R. 2055 (1934 meeting).

abundant evidence showing that such control was in fact exercised. Thus Wilhelm specifically approved the decision to acquire petitioner; Frankenberg was made petitioner's managing director at Wilhelm's request; Frankenberg, in response to Wilhelm's expressions of disapproval, caused the removal of a key officer of the American subsidiaries in whom Fritz had confidence; Frankenberg passed on all important transactions and Fritz recognized that he was powerless to override Frankenberg's decisions.[21] Significantly, Fritz von Opel never participated even formally in the management of petitioner's affairs, but acted under specific powers of attorney issued by the corporate directors from time to time (R. 1510–1511).

Petitioner, in its statement of facts (Br. pp. 6–7), appears to argue, however, that Franken-

[21] Petitioner states (Br. p. 6) that control was inferred "simply because Frankenberg was consulted and his advice obtained." We need only refer to one incident, testified to by Houghland, the American president of Spur and a witness whom Judge Laws said he believed (R. 1679). Referring to a proposal to set up a chain of subsidiaries, Houghland testified that Fritz told him that Frankenberg "would have to pass on anything of this magnitude" (R. 1137). The matter was accordingly submitted to Frankenberg, who rejected the proposal (R. 1138). Houghland testified further (R. 1139):

"Well, [Fritz] said he was sorry that Dr. Frankenberg did not approve the idea; that he himself did approve the idea and he thought it was a wise one, which, incidentally, it certainly turned out to be; but that Dr. Frankenberg was his father's financial representative; that there was nothing that could be done upon a decision of this sort after Dr. Frankenberg did not approve."

berg's agency for Wilhelm ceased as a matter of law upon the outbreak of war between the United States and Germany, Frankenberg then being in the United States. From this it argues that all enemy control of petitioner automatically ceased with the outbreak of war. The premise on which the argument is based is erroneous. The very cases cited by petitioner (Br. p. 7, n. 4) establish that

> Agencies, created before the war, and not requiring intercourse across the enemy's frontier, such as for the collection of debts, preservation of property, and so forth, are not terminated by war. [*Sutherland* v. *Mayer*, 271 U. S. 272, 288.]

Accord: *Williams* v. *Paine*, 169 U. S. 55 (upholding a wartime sale by the agent of an enemy).[22]

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[22] In *Insurance Co.* v. *Davis*, 95 U. S. 425, this Court, although holding that the particular agency before it had terminated said (at p. 430):

"If the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close."

Williams v. *Paine* limited the holding in the *Davis* case to cases of insurance agents who were required during the war to remit funds across belligerent lines—conduct necessarily involving prohibited intercourse with the enemy.

Other cases in which agencies, in addition to those for the collection of debts, have been held to survive the outbreak of war are: *Fujino* v. *Clark*, 71 F. Supp. 1, (D. Hawaii), affirmed, 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U. S. 937; *Second Russian Insurance Co.* v. *Miller*, 297 Fed. 404 (C. A. 2), affirmed, 268 U. S. 552; *Hubbard* v. *Matthews*, 54 N. Y. 43; *Pipe* v. *The La Salle*, 49 F. Supp. 662 (S. D.

But even if the premise had been valid, the conclusion would prove too much. Petitioner asks this Court to hold that Wilhelm's complete control of petitioner and its assets, established as an integral part of the 1931 arrangements and consistently exercised during ten years, suddenly and automatically ceased. The very event—the outbreak of war—which creates the power to vest enemy-controlled property is said to immunize the property from its exercise. The contention almost answers itself.

Normally, the inference is warranted that a relationship or course of conduct, proven to exist over a period of time, continues to exist thereafter. *E. g., Penn Oil Co.* v. *Vacuum Oil Co.*, 48 F. 2d 1008 (C. A. D. C.); *Easterday* v. *United States*, 292 Fed. 664 (C. A. D. C.), certiorari denied, 263 U. S. 719.[22] (See Fdg. 40, R. 58.) Here, however, we have more than a course of conduct; Wilhelm's powers of control were an integral part of the property arrangements made by the 1931 transaction. Those property arrangements were in force, unchanged, on the date of vesting, and there is no evidence that any of the parties to them, or any of petitioner's officers, by word

N. Y.); *Daimler Co.* v. *Continental Tyre & Rubber Company*, [1916] 2 A. C. 307, 326, 349.

[22] See also *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660 (C. A. 9); *National Labor Relations Board* v. *Puget Mansing Wood Products Co.*, 109 F. 2d 552 (C. A. 6); Wigmore, *Evidence* (1940 ed.), Sec. 2530.

or deed disavowed the prior explicit recognition of Wilhelm's dominant position (Fdg. 40, R. 58). Certainly there was no physical impediment to Wilhelm's continued exercise of control. Wilhelm was in no way barred from communicating with petitioner in Switzerland, and petitioner, in turn, was free at all times to communicate with the United States.

Accordingly, the absence of direct proof of the exercise of control after the outbreak of the war does not help petitioner. Although petitioner had the burden of proof, *Thorsch* v. *Miller*, 55 App. D. C. 295, 297, 5 F. 2d 118, 121, appeal dismissed, 274 U. S. 763; *Von Zedtwitz* v. *Sutherland*, 58 App. D. C. 153, 154, 26 F. 2d 525, 526; *Sturchler* v. *Hicks*, 17 F. 2d 321, 322 (E. D. N. Y.), the Government, with an abundance and explicitness of proof unusual on such a question as the control of a foreign corporation, clearly proved not only the existence but the exercise of German control from 1931 to 1941. To require, in addition, direct proof of the actual exercise of control by an enemy over American properties after the outbreak of war, would be tantamount to insisting that the Trading With the Enemy Act could become operative only after the enemy had succeeded in doing what the Act was designed to prevent. No such stultifying restriction can be read into this wartime statute. In general, enemy status under the Trading With the Enemy Act is established at the outbreak of war and is not lost

by acts occurring thereafter. *Schrijver* v. *Sutherland*, 57 App. D. C. 214, 19 F. 2d 688, certiorari denied, 275 U. S. 546 (ownership); *Société Suisse* v. *Cummings*, 99 F. 2d 387 (C. A. D. C.) (doing business in enemy territory); *Sarthou* v. *Clark*, 78 F. Supp. 139 (S. D. Cal.) (acting as enemy agent); *Beck* v. *Clark*, 88 F. Supp. 565 (D. Conn.) (ownership). *A fortiori*, control shown to exist at the outbreak of war cannot be presumed thereafter to have ceased.

The suggestion that rights of ownership were not exercised is equally without substance. It is true that petitioner declared no dividends. This is precisely what might have been expected. Any distribution of dividends to Wilhelm and Marta von Opel would have defeated the very purpose of the 1931 arrangements. Their principal objective was to remove the funds from the reach of the German foreign exchange control laws. Once that was accomplished, the real value of these assets to Wilhelm and Marta was not that they represented capital or even a source of income—this they were even while they were subject to German laws—but that they were *free* assets, free, that is, from German monetary controls. Obviously Wilhelm, a man of great wealth, had no need for additional income in Germany. As long as he had sufficient funds within Germany for his support, it would have been utter nonsense to channel petitioner's dividends into Germany where the exchange control laws would have compelled their conversion into German marks.

To keep both the income and the principal "free" it had to be kept "outside the German locked safe". (see p. 20, *supra*). On the other hand, when he desired foreign exchange Wilhelm could and did draw on petitioner. Thus one of the American subsidiaries raised $150,000 by sale of oil properties to help pay Wilhelm's fine to the German government (R. 1229–1230). And petitioner paid Wilhelm's expenses on a trip to Hungary and a trip to South America (Fdg. 53, R. 61). In short, Wilhelm treated petitioner's funds like a bank acount on which he could draw at will.

II.

BY REASON OF SUCH ENEMY OWNERSHIP AND CONTROL PETITIONER WAS AN ENEMY INELIGIBLE TO RECOVER VESTED PROPERTY IN THE PRESENT SUIT

Originally the Trading With the Enemy Act adopted a strictly territorial concept of "enemy" as applied to corporations. Under Section 2 of the Act, as enacted in 1917, a corporation was an enemy if it was incorporated in or did business within enemy or enemy occupied territory. And it was held that a corporation incorporated in neutral territory was not an enemy under this provision even though wholly owned and controlled by enemies. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457; *cf. Hamburg American Co.*, v. *United States*, 277 U. S. 138. By the First War Powers Act, 1941, however, Congress amended Section 5 (b) of the Act to authorize the vesting of property of any foreign country or national

thereof. The applicable executive definitions of the term "national" included "any * * * corporation * * * which on or since [the effective date of Executive Order 8389] was or has been controlled by, or a substantial part of the stock, shares, * * * or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly," one or more "nationals" of the designated country.[24]

These amendments reflected a legislative awareness that the Axis countries and their nationals, by various means, had acquired indirect ownership or control of nominally neutral property. Indirect ownership was exercised through nominees, trusted agents and complex holding company structures, the stock of such holding companies generally being in the form of bearer shares whose ownership was exceedingly difficult to trace; control was often divorced from legal title or ownership and exercised through options,

[24] Executive Order 8389 (April 10, 1940), 5 F. R. 1400, as amended by Executive Order 8785 (June 14, 1941) 6 F. R. 2897, sec. 5 E (ii); made applicable to the exercise of the vesting power by Executive Orders 9095 (March 11, 1942), 7 F. R. 1971, and 9193 (July 6, 1942), 7 F. R. 5205, sec. 10. As a corporation controlled and beneficially owned by nationals of Germany petitioner was a "national of a designated enemy country" within the meaning of Executive Order 9193, and was determined to be such by the Custodian, Vesting Order No. 51, 7 F. R. 6503; Amendatory and Supplemental Order No. 1 to Vesting Order No. 14, 9 F. R. 8083.

These executive definitions were ratified by Congress, Joint Resolution of May 7, 1940, 54 Stat. 179; First War Powers Act, 1941, sec. 302, 55 Stat. 840.

contractual relationships, gentlemen's agreements, possession of vital technical information and loyalty of key personnel.[25] By such devices American property could be made as readily available for purposes of economic warfare as if it were owned outright, but with less investment, less risk and greater possibilities for concealment.

On the previous appeal in this action, this Court recognized that the 1941 amendments were adopted to meet the challenge of such devices by giving the President power "to deal effectively with property interests which had either an open or concealed enemy taint" (332 U. S. at 485–486). It held that in order to give effect to those amendments the definitions set forth in section 2 must be regarded as "merely illustrative, not exclusionary" (pp. 488–489) so that all persons or corporations affected with an "enemy taint" are now within reach of the term "enemy".

Although this Court did not attempt a comprehensive definition of the new concept of enemy, it declared unequivocally that the result in *Behn, Meyer & Co.* v. *Miller, supra*, was "destructive

[25] See H. Rept. 1547, 77th Cong., 1st sess., p. 3; United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 29–31; Hearings before a Subcommittee of the Senate Committee on Military Affairs (Kilgore Committee) 79th Cong., 1st Sess., pursuant to S. Res. 107 and S. Res. 146, June–December, 1945, pp. 49, 52, 68–9, 564–85, 969–77, 1063, 1203–1221; H. Rept. No. 2398, 79th Cong., 2d Sess., p. 3.

of the objectives of the 1941 amendment" (p. 486) and had no current vitality (p. 488). It thus reversed completely the policy, embodied in that case, of refusing to determine the enemy status of a corporation by the status of those who owned or controlled it. It left no doubt that a corporation which "was owned or controlled by enemy interests" (p. 486) is itself an enemy.[26] As we understand its Brief, petitioner concedes that if it was owned and controlled by enemies it cannot recover anything in this action (see *supra*, pp. 30–31).

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[26] A similar test of enemy ownership or control has also been made applicable to claims for discretionary administrative return by Section 32 (a) (2) (E) of the Act (referred to by this Court, 332 U. S. at 490), and has been recognized in international agreements, see Art. 11 (b) of the Brussels Agreement of December 5, 1947, quoted at page 30, n. 10, of petitioner's brief.

In Section 39 of the Act, added July 3, 1948, Congress, in prohibiting judicial return to "nationals" of Germany or Japan, reaffirmed the tests embodied in the 1941 amendments and Executive Orders issued thereunder. Since petitioner, being owned and controlled by enemies, was both a "national" of Germany within Executive Order 8389 and a "national of a designated enemy country," within Executive Order 9193 (see note 24, *supra*), Section 39 affords an alternative ground for supporting the result below. See Brief for Petitioner in *McGrath* v. *Nagano*, No. 169, this Term. Respondent so urged in the court of appeals, but that court found it unnecessary to pass on the question.

Compare Section 8 of the British "Distribution of German Enemy Property Act, 1949," 12, 13 & 14 Geo. 6, Ch. 85, which includes in its definition of German property which will not be returned, the property of any corporation "which * * * was controlled by" German nationals resident in Germany.

This test of enemy ownership or control is concerned with economic fact, not legal form. Thus, it is immaterial that, for reasons of his own convenience, Wilhelm von Opel by the 1931 transaction placed "legal title" (Fdg. 18, R. 55) to the shares in his son's name. As the court below held, the "ownership by enemy nationals of the economic benefits" of the property is determinative, and the "bare ownership of a sterile legal title" is of no consequence (R. 2327). In administering the Trading With the Enemy Act the courts have always looked, not at legal title, but at "beneficial ownership." *Stoehr* v. *Wallace*, 255 U. S. 239, 251. See also the district court opinion in the same case, 269 Fed. 827, 835 (S. D. N. Y.); *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, [illegible] (S. D. N. Y.).[27]

[27] Compare *Hodgskin* v. *United States*, 279 Fed. 85, 90 (C. A. 2); *Kind* v. *Clark*, 161 F. 2d 36, 47 (C. A. 2); *Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C. A. 2), certiorari denied, 333 U. S. 873; *Fujino* v. *Clark*, 172 F. 2d 384, 385 (C. A. 9), certiorari denied, 337 U. S. 937. The cases cited in this note used language of "sham", and many of them disclosed an attempt by the parties to conceal the enemy's beneficial ownership. Whether or not there was concealment is immaterial; the Act reaches property having an "open or concealed enemy taint." *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 486. See *Stoehr* v. *Wallace*, 255 U. S. 239; *Fujino* v. *Clark*, *supra*. Nor do we perceive any essential difference, for present purposes, between a transaction which is disregarded as a sham, and a transaction which, when given effect according to its terms, leaves the beneficial interests in the enemy. Thus in *Stoehr* v. *Wallace*, *supra*, the district court assumed that legal title was in American hands (269 Fed. at 835) and the rationale of this Court's opinion was that

In construing the Act as giving the Executive "flexible powers" to reach interests which "masqueraded under * * * innocent fronts" and to deal with enemy "devices" for acquiring "indirect control or ownership" of American property (332 U. S. at 484–485), this Court, on the prior appeal in this case, reflected a concern for practical results without regard to the legal niceties by which they may be achieved. In other contexts this Court has emphasized that the existence of control turns on actualities and presents issues of fact "to be determined by the special circumstances of each case". *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145.[28]

a transfer of legal title which was "made to avoid inconvenience" and which left "beneficial ownership" in an enemy could not prevent seizure (255 U. S. at 251).

[28] See the report of the House Committee on the bill which became the Federal Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. 151, referred to by the Court, 307 U. S. at 145:

"* * * No attempt is made to define "control", since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the *intention is to include actual control as well as what has been called legally enforceable control.* It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few samples of the methods used are stock ownership, leasing, contract, and agency. It is well known that actual control may be exerted through ownership of a small percentage of the voting stock of a corporation, either by the ownership of such stock alone or through such ownership in combination with other factors." [Emphasis added.] (H. Rept. 1850, 73d Cong., 2d Sess., p. 5.)

And the courts have recognized that "control" and controlling influence "include the power to control and the power to exert a controlling influence, as well as the actual exercise of such power" (*Public Service Corporation* v. *Securities and Exchange Commission*, 129 F. 2d 899, 903 (C. A. 3); *Detroit Edison Co.* v. *Securities and Exchange Commission*, 119 F. 2d 730, 739 (C. A. 6), certiorari denied, 314 U. S. 618) and "may spring as readily from advice constantly sought as from command arbitrarily imposed" (*American Gas & Electric Co.* v. *Securities and Exchange Commission*, 134 F. 2d 633, 642 (C. A. D. C.), certiorari denied, 319 U. S. 763).

The English courts have applied an equally practical approach to the problem of determining whether a corporation incorporated in neutral territory is an enemy. Those courts adopted during World War I and have since applied, the rule that a neutral corporation, owned or controlled by enemies, is an enemy. *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co.*, [1916] 2 A. C. 307; *The St. Tudno*, [1916] P. 291; *The Polzeath*, [1916] P. 241; *The Michigan*, [1916] V Ll. P. C. 421; *The Hamborn*, [1919] A. C. 993; *In Re Badische Co., Ltd.*, [1921] 2 Ch. D. 331. They have said that "the true test is control," *In Re Badische Co., Ltd., supra*, at 371. Enemy ownership sufficient to carry proposals at a stockholders' meeting has been held to establish such control. *The Polzeath, supra*; see *The Hamborn*,

supra, at 997. And a corporation has been said to be enemy "if its agents or the persons in de facto control of its affairs, whether authorized or not" are resident in enemy territory or taking instruction from persons so resident. *Daimler Co.* v. *Continental Tyre & Rubber Co., supra*, at 345.[29]

Applying these tests here, it is clear that Wilhelm von Opel, directly and through Frankenberg, exercised both as to petitioner and its American subsidiaries the power to "make and unmake [the corporate] officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account." *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co., supra*, at 340. Such control, without more, justifies the seizure and retention of the properties here in suit.

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[29] Comparable principles have long been applied by American courts in the field of prize law, to which the Trading with the Enemy Act is historically and constitutionally related (see *Stoehr* v. *Wallace*, 269 Fed. 827, 840 (S. D. N. Y.), affirmed, 255 U. S. 239). Thus, a neutral partner's share in a cargo left under the control and management of the other partners who were enemies, has been held to be properly condemned. *The William Bagaley*, 5 Wall. 377; *The San Jose Indiano*, Fed. Cas. No. 12322 (C. C. D. Mass); see also *The Friendschaft*, 4 Wheat. 105, 107, and *The Cheshire*, 3 Wall. 231, 233. Similarly, a ship surrendered by a neutral to enemy control is properly subject to condemnation when employed by the enemy in belligerent trade. *The Hart*, 3 Wall. 559, 560 (1865); *The Bermuda*, 3 Wall. 514, 556–557 (1865); *The Adula*, 89 Fed. 351, 355 (S. D. Ga.), affirmed, 176 U. S. 361.

It is not necessary for present purposes to resolve the problems that might arise in a case in which control was divorced from ownership, or accompanied by only a "negligible" ownership interest (332 U. S. at 489-490). As the Court of Appeals said, "this is not a borderline case" (R. 2333). Here the enemy's practical control is joined with a substantial ownership interest in all of petitioner's shares. Nor is there here any problem of protecting neutral investments. (See Pet. Br. p. 15.) The only assertedly neutral interest in petitioner is that of Fritz von Opel. That interest was acquired by gift; in acquiring and holding it Fritz understood, and indeed repeatedly asserted, that his father had the beneficial ownership and the entire control, and he acted, as the district court found, subject to his father's direction. Thus, quite apart from the question whether Fritz can in any real sense be deemed a neutral (see pp. 56–57, 63–64, *infra*), he bears no conceivable resemblance to a bona fide neutral investor who embarked his own funds in an enterprise without knowledge of the national character of those who controlled it.

Petitioner, although apparently conceding that enemy ownership and control are sufficient to sustain the seizure, at times suggests that there must in addition be proof of actual "utilization for economic warfare" (Br. p. 18; see pp. 11, 14, 23, 24). The Trading With the Enemy Act has,

however, never been regarded as requiring such proof; it proceeds on the belief that the barn door should be locked before, not after, the horse has been stolen. The guiding principle of all such legislation has been that—

> any property which the enemy *can* use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy *have the power* of devoting to the enemy's use, is a proper subject of confiscation. [*Miller* v. *United States*, 11 Wall. 268, 306.] [Emphasis added.]

Petitioner's suggestion that the vested properties "could not have been used for the purpose of economic war" (Br. p. 3) misconceives the objective of the Trading With the Enemy Act. The production, refining and distribution of oil and gasoline (see p. 3 *supra*), are certainly not unrelated to the prosecution of modern war. But in any event, the powers of seizure under the Trading With the Enemy Act are not limited to strategic and critical materials. Congress and the Custodian have acted on the theory that property, of whatever nature, which is owned or controlled, directly or indirectly, by enemies is of potential use to the enemy; it is the purpose of the Act to deprive enemies "of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States * * * through the use of assets that happened to be in

this country." *Propper* v. *Clark*, 337 U. S. 472, 481. Property of any kind is convertible into cash and may form the basis for extension of credit. For this reason the Custodian has vested thousands of bank accounts, negotiable securities, and interests in real property and tangible or intangible personal property. See *e. g.*, Annual Report, Office of Alien Property (1948), pp. 71–78; *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42, 59–60. Most such interests are relatively small, and viewed in isolation constitute far less of a threat of economic warfare than do the very substantial resources here involved. But they have been vested because in the aggregate their value is substantial and, if unvested, they might have afforded the basis for substantial realization of financial resources by the enemy.

The vested properties in suit constituted such a valuable financial resource of the enemy. The Opel parents were entitled to the income of the properties. By virtue of their absolute control over petitioner and its American subsidiaries they could dispose of the properties at will. The German government, through its physical control of the Opel parents and their allegiance to it, could have compelled them to make available to it the financial resources of petitioner and its American subsidiaries. Indicative of this is the sale of part of the assets of one of the Louisiana companies to satisfy the fine imposed upon Wilhelm von Opel. The properties were thus as fully

available to the enemy as if the entire legal ownership had been vested in Wilhelm von Opel.

Had the Opel parents owned all of the shares of petitioner outright, there could be no doubt that its American assets could properly have been vested and retained. Petitioner urges, however, that it can escape confiscation of its American assets because its shares were placed in Fritz von Opel's name, although it was understood that the Opel parents retained all the powers of control and virtually all the rights of beneficial ownership which they would have possessed had they held full legal title to the shares. Petitioner would reduce the World War II amendments to the Act and the previous decision of this Court to a mere requirement of interposing one additional link in the chain by which enemy ownership and control are exercised. Such an argument would receive short shrift in other fields of law.[30] It is entitled to no more consideration here.

In this connection it should be emphasized that this case is concerned with dealings within a family group. In the tax field transactions within an intimate family group dominated by a wealthy father have long been held to be subject to special scrutiny. *Helvering* v. *Clifford*, 309 U. S. 335; *Commissioner* v. *Tower*, 327 U. S. 280, 291. Like principles have been applied under the Trading

[30] Compare, e. g., *Hormel* v. *Helvering*, 312 U. S. 522; *Helvering* v. *Clifford*, 309 U. S. 331; *Commissioner* v. *Lamont*, 127 F. 2d 875 (C. A. 2).

with the Enemy Act. *Fujino* v. *Clark*, 71 F. Supp. 1 (D. Haw.), affirmed, 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U. S. 937. In situations where the head of the family has retained less control than was the case here, he was treated, for tax purposes, as the owner of the property involved. See *e. g.*, *Helvering* v. *Horst*, 311 U. S. 112, 118; *Harrison* v. *Schaffner*, 312 U. S. 579; *Helvering* v. *Clifford*, 309 U. S. 331, 335; *Cf. Commissioner* v. *Estate of Church*, 335 U. S. 632. *Spiegel* v. *Commissioner*, 335 U. S. 701. Here, Wilhelm von Opel, like the American taxpayers in those cases and for closely parallel reasons, sought to rid himself of formal legal title in order to avoid the impact of governmental measures—the German foreign exchange laws—while keeping as many strings to his property as he possibly could. In like circumstances our courts have not hesitated to cut across the legal refinements of title and conveyancing to find ownership in the grantor who has withheld substantial enjoyment and control from his grantee. The Court of Appeals for the Second Circuit has aptly observed that while in the law of trusts "the cutting edge of the pertinent rule must be razor-sharp," in income tax law "the helpful image is rather that of a broad-sword," *Commissioner* v. *Buck*, 120 F. 2d 775, 777 (C. A. 2). *A fortiori*, the broadsword is the proper tool to use in applying the Trading With the Enemy Act, which seeks to safeguard

national interests, even more vital than those of the fisc.

III

ADDITIONAL CIRCUMSTANCES CONFIRM THE CONCLUSION THAT PETITIONER WAS AN ENEMY

In addition to the factors which have been discussed, the district court relied upon two additional elements of enemy taint. The Court of Appeals found it unnecessary to consider them, since in its opinion petitioner was clearly an enemy by reason of enemy ownership and control. While we agree that such ownership and control, without more, establish petitioner's enemy status, we believe the matters referred to clearly afford additional support for the result below.

A. *The enemy taint of Fritz von Opel*

As already indicated, the only persons asserted to have an interest in petitioner are Wilhelm and Marta von Opel and their son Fritz. Wilhelm and Marta were admittedly enemies. In addition, we also believe that any interest which Fritz von Opel owned is itself enemy tainted.

Fritz, a German by birth, acquired Liechtensteinean citizenship in a most unusual manner some time after the outbreak of World War II in Europe. It was, as he described it, a passport which he bought for $10,000 and with which he was able to "fool the English" (R. 1146). Else-

where he spoke of it as acquired for business reasons (Def. Ex. 95, R. 2295). The statutory requirement of three years' residence was waived and the additional requirement of an oath of allegiance was ignored. In fact, Fritz von Opel had never lived in Liechtenstein and knew very little about that country. Thereafter, although ostensibly a neutral citizen, he spoke of himself as a German, cheered the progress of the German armies in the war and was pleased that some of his inventions were aiding that effort (*supra*, p. 25). The district court thus properly characterized his Liechtensteinean citizenship as a "technical status" (R. 48) and a "technical form" (R. 49).

In addition, the court found that to the extent Fritz carried on activities on behalf of petitioner, he did so under the guidance and control of his father, Wilhelm von Opel (Fdg. 45, R. 59). This guidance and control rested not merely on the family relationship but, more importantly, was understood to be part of the 1931 arrangements by which Wilhelm had given Fritz whatever interest Fritz may be deemed to have had in petitioner. On the findings, Fritz was as much his father's agent as was Frankenberg. Indeed, in selling the Opel shares, Fritz acted upon power of attorney from his father; thereafter, in dealing with petitioner's affairs, he acted under powers of attorney from petitioner, signed by

Frankenberg (Def. Ex. 8, R. 1985, 2009–2010).[n] And he let the shares held formally in his name be voted by Frankenberg (see p. 37, n. 20, *supra*), a clear indication that such powers of management as he might have had were at his father's disposal.

In such circumstances it is unrealistic in the extreme to argue that such interest as Fritz may have had in petitioner is an independent neutral interest which precludes the retention of the vested assets. The interests of father and son were inseparably united, with the father unquestionably dominating the corporation. Fritz was, indeed, part of the apparatus through which his father controlled and administered petitioner.

B. *Petitioner's doing of business in Hungary*

Section 2 of the Act defines "enemy" as including any corporation incorporated outside the United States and doing business within enemy territory. The original Committee Report on this provision indicates that it was intended to

[n] While there is no suggestion that Fritz ever revolted against the "guidance and direction" of Wilhelm and Frankenberg, it may be noted that their control over him did not rest merely on his acquiescence; in addition they held the purse strings. Fritz' contractual right to 20% of dividends was valueless unless petitioner declared dividends—which Wilhelm and Frankenberg, through their practical control of the corporation, could control. In fact, petitioner's income was received not as dividends but as salary and expenses, something even more clearly within Frankenberg's control as managing director. See p. 10, n. 3, *supra*.

include within this definition a foreign corporation "having a branch or ageney actively conducting business within" an enemy country (S. Rept. No. 113, 65th Cong., 1st Sess., p. 4). It was also made clear at the time the Act was debated in Congress that the condemnation of enemy should apply even though the doing of business in enemy territory constituted only a minor part of the total business of the corporation (55 Cong. Rec. 4843).

It cannot be disputed that if petitioner, after December 13, 1941, had itself mined and shipped bauxite from Hungary, it would have been doing business in enemy territory and would have been an enemy under Section 2 of the Act. *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42. Under the 1941 amendment to the Act and this Court's previous opinion in this case, the fact that a petitioner conducted such business through a wholly owned corporate subsidiary should constitute another aspect of enemy taint. This is particularly true in view of the abundance of evidence that, far from being a passive investment of petitioner, Transdanubia's activities were actively dominated and controlled by petitioner and its agents. Thus, Fritz von Opel, acting for petitioner, made numerous trips to Hungary to conduct Transdanubia's affairs and carried on a fairly extensive correspondence for Transdanubia. He likewise negotiated the contract which obligated Transdanubia to ship bauxite to Giulini

Bros. of Germany through 1942. In addition, petitioner itself guaranteed a loan to Transdanubia and repeatedly requested and secured extensions of the loan and the guarantee during the war."

In the light of these circumstances, we think that the district court properly held that the activities of petitioner's Hungarian subsidiary in enemy territory formed at least an additional ground for characterizing petitioner as an enemy.

IV

PETITIONER'S CLAIM TO PARTIAL RECOVERY IS WITHOUT SUBSTANCE

Petitioner's claim to partial recovery (Brief pp. 25-29) rests on the same mistaken assumption of facts as does its argument on lack of taint. Petitioner concedes that if it had been "subject to command and actual control by the enemy" it could recover nothing in this action (Brief p. 26). But it asserts that the entire ownership and control were in a neutral, and that the enemy's rights were limited to those created by a supposed "escrow agreement" or "mortgage" or "pledge" (Brief, pp. 26, 28, 29). Thus, in effect, it reargues the question of taint.

Upon analysis, moreover, it is apparent that what petitioner is asking for in this portion of

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[22] Presumably petitioner regards its participation in Transdanubia's affairs as a typical activity of a neutral corporation "acquired for the purpose of precluding the enemy from obtaining or utilizing its assets" (Br., p. 24).

its brief is not partial recovery but complete recovery. It urges that the entire vested property should be returned and that the Custodian should be relegated to demanding dividends during the lifetime of the Opel parents, and to exercising "such voice in the management as the law permitted." (Brief, pp. 26–27). This is to be done "without taking the assets" of petitioner (Brief, p. 10). The suggestion is purely illusory. Petitioner fails to explain how the Custodian, having surrendered all of petitioner's properties that are subject to the jurisdiction of the United States, could either compel a Swiss corporation to issue dividends to him or enforce in the Swiss courts a claim to management rights in the Swiss corporation.[33]

If it could be assumed, however, that petitioner is seeking a return of some proportionate part of the vested property, any such claim would be subject to two fatal infirmities. In the first place, no such claim was reasonably presented in the trial court. The case was tried by petitioner on an all-or-nothing theory. The complaint and the pretrial order contain no suggestion of a

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[33] In general the Swiss courts have refused to give any effect to the trading-with-the-enemy legislation of the belligerent powers and any acts taken under such legislation. See the decisions of the Swiss Supreme Court in *Guige, Déchandon, Auclair et Cie*, contre *Stromeyer* (1941), 40 BGE II, 483; *La Nationale* contre *Biermann* (1916), Revue de Droit International Privé (1917), 348; *Bachert & Cie.* contre *Zurich* (1927), 53 BGE III, 54.

claim for partial recovery.[34] Evidence was taken for 21 days, during which no suggestion of such a claim was made and no evidence bearing on such a claim offered. During the closing arguments, counsel for petitioner flatly admitted that it would lose the case if the Opel parents owned the interests which petitioner in the "Gold case" had asserted the parents owned (Tr. 2677–2678).[35] Still later, counsel for petitioner suggested for the first time that even if enemy interests were found to exist, a partial recovery could be awarded. (Tr. 2711–2712.) Judge Laws expressed great surprise at this new contention (Tr. 2711); he pointed out that in the absence of evidence concerning the divisibility of the interests he would be unable to shape a decree directing such a separation (Tr. 2951–4, 2959–61). Even at this point, petitioner neither moved to amend the pleadings nor offered additional evidence. Accordingly, the trial judge refused to consider the claim, pointing out that had a claim to such a partial recovery been seasonably made,

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[34] The amended complaint (R. 1–6) simply alleged that plaintiff had at no time been an enemy or a national of a designated enemy country and that the vested properties had at no time been "owned or controlled, directly or indirectly, in whole or in part" (R. 5, 6) by any such enemy or national. The pre-trial order (R. 10) recited that (aside from certain issues as to Transdanubia) "the only issue of fact * * * is whether the stock of the plaintiff is owned by or the plaintiff is otherwise controlled by enemy aliens."

[35] "Tr." references are to the unprinted stenographic transcript, on file with the Clerk.

the Government might well have presented "other factual information and develop legal arguments which only partially have been made in this case." (R. 51)[36]

Plainly, this ruling was within the discretion of a trial judge charged with the conduct of a lengthy and complicated trial (*Cf. E. I. Du Pont De Nemours & Co.* v. *Martin*, 174 F. 2d 602 (C. A. 6); *Moiger* v. *Johnson*, 180 F. 2d 777 (C. A. D. C.)), particularly since the ruling did not prejudice any contentions that may be made by Fritz von Opel in suits filed by him (*Fritz von Opel* v. *McGrath*, Civ. 50–70 (S. D. N. Y.); *Fritz von Opel* v. *Clark*, Civ. Action No. 1910–49 D. D. C.); *Fritz von Opel* v. *Clark*, Civ. Action No. 1923–49 (D. D. C.)).

In the second place, there is no separate neutral interest. Petitioner was beneficially owned and controlled by enemies (see pp. 31–43, *supra*). As

[36] Some of the problems to which proof of matters of fact and of foreign law, and arguments, would presumably have been addressed are these: Is the separability of the respective interests determined by the laws of the United States, the situs of the vested assets, or the laws of Germany which governed the 1931 agreement, or the laws of Switzerland where petitioner was incorporated? If the interests were separable, how, and by what law, were they to be evaluated? Could the interests of Wilhelm and Marta be measured by whatever standards might have been established for ordinary usufructuaries or would Wilhelm's complete dominance in the affairs of petitioner make these standards inappropriate? Could a decree be so fashioned as to avoid that any property returned inure to the benefit of the enemy interest?

such it was an enemy, lacking capacity under Section 9 (a) of the Act either to bring suit or to recover.[37] And petitioner concedes that partial recovery may not be awarded to a corporation which is controlled by enemies. See also the Government's brief in No. 172, *Kaufman* v. *Société Internationale, etc.* In addition, Fritz von Opel, the asserted neutral, was a neutral citizen as a matter of "technical" form only (R. 49); his roots and sympathies continued to be with Germany. He not only acceded to his father's control of petitioner; he served as his father's agent and in his father's interest in the conduct of petitioner's affairs, acting subject at all times to the directions of his father and his father's agent, Frankenberg (*supra*, pp. 13, 33). Having been a part of the enemy control of petitioner, he cannot now divorce himself from it.

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[37] Section 9 (a) provides that "any person not an enemy or ally of enemy" may file a claim and bring an action thereunder, and may recover the property to which he establishes that he is entitled.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted.

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